European Imports, Inc. *and* Teamsters Local 703, Petitioner. Case 13–RC–192428

February 23, 2017

ORDER

BY ACTING CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

The Employer's "Emergency Request for Review" seeking to reschedule the election scheduled for February 23, 2017, is denied.[1] Following the election, the Employer remains free to file an objection challenging the Regional Director's decision.

Dated, Washington, D.C. February 23, 2017

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

ACTING CHAIRMAN MISCIMARRA, dissenting.

This case gives rise to the concerns expressed in my dissenting views regarding the Board's Election Rule.[1] Specifically, this case illustrates the downside associated with the Rule's "preoccupation with speed between petition-filing and the election."[2] The Election Rule adopts a single-minded standard regarding what date should be selected when Regional Directors schedule an election: every election must be scheduled for "the *earliest date practicable*. . . ."[3]

Here, the election date set by the Regional Director—pursuant to the Election Rule's mandate—only gave *three days' notice* to a substantial number of employees that they would be voters in a union-representation election. For the reasons that former Member Johnson and I stated in the Election Rule's dissenting views, I believe the time frame adopted in this case unduly prejudices the parties and extinguishes the employees' right to have a reasonable period of time to become familiar with election issues.[4] This abbreviated time frame, as to a substantial portion of the bargaining unit, also curtailed the right of all parties to engage in protected speech. Accordingly, I respectfully dissent from the majority's denial of the Employer's emergency request for review and to have the election postponed from February 23, 2017, to March 1, 2017.

The representation petition in this case was filed on Friday afternoon, February 3, 2017.[5] The petition described the bargaining unit as including "[a]ll full time and regular part time Forklift Drivers, Order Selectors, and Dock Workers employed by the employer at its facility located at 600 East Brook Drive, Arlington Heights, IL 6005 [sic]." The petitioned-for unit excluded "[a]ll maintenance employees, janitorial employees, supervisors, managers, office clerical and guards as defined by the Act."

Consistent with the timetable prescribed in the Election Rule, the Region on February 3 sent a notice requiring the Employer to post an election notice by Tuesday, February 7. The notice required the Employer to prepare and submit a written statement of position by noon on Friday, February 10; and to appear at a hearing on Monday, February 13. The Employer's statement of position raised an objection that the Board's Election Rule deprived the Employer of due process and caused unfair "prejudice to the Employer." The statement of position also identified 52 employees that the parties had agreed

[1] We have treated the Employer's "Emergency Request for Review" as a request for extraordinary relief asking expedited consideration of its request for review under Sec. 102.67(j)(1)(i) of the Board's Rules and Regulations.

[1] 79 Fed. Reg. 74308 at 74430–74460 (December 15, 2014) (dissenting views of Members Miscimarra and Johnson).

[2] Id. at 74436.

[3] Election Rule Sec. 102.67(b), 79 Fed. Reg. at 74485 ("The regional director shall schedule the election for the earliest date practicable consistent with these rules.").

[4] As explained in the dissenting views that former Member Johnson and I expressed in the Election Rule, the legislative history of the National Labor Relations Act reflects substantial concern about ensuring that employees be afforded a reasonable period prior to any election to become familiar with election issues and to permit parties to engage in protected speech. When evaluating Landrum-Griffin Act amendments to the NLRA, then-Senator John F. Kennedy—who chaired the Conference Committee—repeatedly stated that at least 30 days were required before an election to "safeguard against rushing employees into an election where they are unfamiliar with the issues." 105 Cong. Rec. 5361 (1959), reprinted in 2 LMRDA Hist. 1024. Again, Senator Kennedy stated that "there should be at least a 30-day interval between the request for an election and the holding of the election," and he opposed proposals that, in his words, failed to provide "at least 30 days in which both parties can present their viewpoints." 105 Cong. Rec. 5770 (1959), reprinted in 2 LMRDA Hist. 1085 (statement of Sen. Kennedy); see also H.R. Rep. 86–741, at 25 (1959), reprinted in 1 LMRDA Hist. 783 (minimum 30-day pre-election period was designed to "guard[] against 'quickie' elections"). See Election Rule, 79 Fed. Reg. at 74437-74441 (dissenting views of Members Miscimarra and Johnson).

[5] All dates are 2017 unless otherwise indicated.

to include in the unit, including nine employees whose classifications were not listed in the petition.

At the February 13 hearing, three events occurred that are relevant to the request for review that is presently before the Board.

First, the hearing officer advised the parties that the Regional Director had directed him "not to take evidence" regarding the Employer's objections to the Election Rule.

Second, the parties resolved a dispute regarding who would be part of the bargaining unit by agreeing that, in addition to other classifications specified in the petition, the unit would include five "inventory control employees" and four "production employees," and they agreed that the unit would exclude four "warehouse clerks."[6]

Third, the parties disagreed regarding the date to be selected for the election. The Union argued for the election to occur on February 23. The Employer argued for a later date—March 1 or thereafter—on the basis that a February 23 election date would deprive many employees of sufficient notice that they would be voting in an election that would dictate whether they would have union representation. Thus, at the February 13 hearing, the Employer's counsel opposed a February 23 election and argued in part as follows:

> The unit description [in] the petition was rather vague and it was unclear as to whether certain significant numbers of employees were included or excluded and, in fact, it was really this morning that the parties formally agreed upon the scope of the unit. So here we are . . . and obviously if we get a direction of election today, possibly tomorrow, *it'll be . . . within a week of that election date that many of these employees will receive their first official notice that an election will be conducted at all they'll be participating in*.[7]

The Employer's counsel added:

> [I]f the regional director compares . . . the petition itself with the stipulation that the parties have entered into, there are actually three groups of employees that were not named as included or excluded in the original petition that are now resolved through the stipulation. That includes the *inventory control department, which is five employees*, the *production department, which is another four employees*, and also *the warehouse clerks . . . which is another four employees*. So that's a group of *at least 13 people that . . . will not be officially notified whether they're in or out until the official election notice is posted in this matter which obviously hasn't happened yet, which is a substantial portion of this unit, about 25 percent of it*.[8]

On Thursday, February 16, the Regional Director issued his Decision and Direction of Election (Decision). The Decision stated that the Regional Director "declined to permit litigation" of the Employer's objections to the Election Rule because the Board and the courts "have already considered and rejected such arguments." Decision, p. 2 (citing *University of Southern California*, 365 NLRB No. 11 (2016); *Pulau Corp.*, 363 NLRB No. 8 (2015); *Associated Builders & Contractors of Texas v. NLRB*, 826 F.3d 215 (5th Cir. 2016); *Chamber of Commerce v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015)). Also, without further explanation, the Decision announced that the election would be held on Thursday, February 23. Consistent with the Decision—and with Section 102.67(k) of the Election Rule—this means the final Board-approved Notice of Election would be posted Monday, February 20, which would be merely three days prior to the February 23 election.

On Friday, February 17, the Employer filed an Emergency Request for Review of the Regional Director's Decision. Consistent with every other accelerated timetable set forth in the Election Rule, this means the Board itself has only six days (including the three-day Presidents' Day weekend) to adjudicate this matter and issue its decision prior to the election.

In the circumstances presented here, I believe the Board should grant the Employer's Emergency Request for Review, strike the February 23 election date, and grant the Employer's request that the election be conducted on March 1, 2017.

Most important, I believe it is contrary to the Act for the Board to set an election date that affords a substantial number of unit employees only three days' notice of a representation election. The Act entrusts to the Board the duty "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act."[9] The Regional Director's February 16 Decision, in reliance on the Election Rule, has produced a situation where the

[6] At the hearing, the parties agreed to the following description of the bargaining unit: "All full-time and regular part-time forklift drivers, order selectors, checkers, receivers, loaders, inventory control employees and production room employees employed by the Employer at its facility located at 600 East Brook Drive, Arlington Heights, Illinois 60005." The original petition did not specifically identify the classifications of inventory control employees and production employees. Including the 9 individuals employed in the classifications added by stipulation at the hearing, the bargaining unit comprises 52 eligible voters.

[7] Hearing transcript, pp. 8–9 (emphasis added).

[8] Hearing transcript, pp. 12–13 (emphasis added).

[9] NLRA Sec. 9(b). Although Sec. 9(b) specifically addresses the determination of appropriate bargaining units, the principle of assuring employees "the fullest freedom" in exercising their rights under the Act is surely pertinent here.

approved Notice of Election would afford only three days' notice to 9 unit employees—comprising roughly 17 percent of the eligible voters—that they would be voting in a February 23 election the outcome of which will decide whether they will be represented by a union.

I have been sharply critical of the Election Rule's "preoccupation with speed,"[10] and I believe it continues to be unreasonable for the Board not to establish *any* concrete parameters regarding a reasonable time frame for conducting representation elections. Thus, in our dissenting views to the Election Rule, former Member Johnson and I stated: "[W]e believe it is important that the Board provide guidelines regarding reasonable minimum and maximum times between the filing of a representation petition and the holding of the election. The majority continues to reject this suggestion, focusing almost exclusively on their objection to the setting of a minimum time."[11] Now, in the instant case, we see what the lack of guidance in the Election Rule has wrought: the Board majority is giving a substantial number of unit employees a mere *three days'* notice in advance of a representation election.

Regardless of what other time frame might be deemed permissible by the Board, three days' notice of an election is clearly insufficient.[12] The situation presented in the instant case illustrates the following concern that former Member Johnson and I expressed in our dissenting views to the Election Rule:

> To state the obvious, when people participate in an election, it is significant whether they actually have a right to vote, whether their vote will be counted, and whether the election's outcome will even affect them. In this respect, the Final Rule's approach would be intolerable in every other voting context, whether it involved a national political election or high school class president.[13]

I also believe the unfairness associated with having a February 23 election date is exacerbated by the Regional Director's refusal to permit the Employer to create a record regarding problems associated with the Election Rule's application *in this case*.

Under Section 9(c)(1) of the Act, whenever a representation petition has been filed, the Board shall investigate and, if there is a question concerning representation, it "shall provide for an *appropriate* hearing *upon due notice*."[14] Given these dual statutory requirements, the Employer was entitled to make a record regarding *actual* prejudice allegedly *being caused in this case* based on the procedures set forth in the Election Rule. By preventing the Employer from introducing such evidence, the Board and any court of appeals have also been prevented from passing on *any* prejudice or denial of due process caused by the Election's Rule's application here, because substantive rulings by the Board and the court must be based on record evidence—i.e., evidence admitted in an "appropriate" hearing.[15]

Significantly, the Employer at the hearing argued that the application of the Election Rule "deprive[d] the Employer of due process and unfairly prejudice[d] the Employer *in this proceeding*."[16] This claim is materially different from the issue presented in the small number of

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[10] Election Rule, 79 Fed. Reg. at 74436 (dissenting views of Members Miscimarra and Johnson).

[11] Election Rule, 79 Fed. Reg. at 74459 (dissenting views of Members Miscimarra and Johnson) (emphasis added).

[12] Even if the Regional Director's February 16 Decision had been *instantly* communicated to all eligible voters (which is not required either by the Decision or the Election Rule), this would have afforded only *seven days'* notice to the 9 voters whose eligibility to vote was approved only in the Regional Director's Decision. I believe there is no material difference between three days' notice and seven days' notice: both are plainly insufficient, considering the abundant legislative history that clearly indicates Congress contemplated at least 30 days' notice prior to any election and disapproved of shorter timeframes and "quicky" elections. See Election Rule, 79 Fed. Reg. at 74437-74441 (dissenting views of Members Miscimarra and Johnson).

[13] Election Rule, 79 Fed. Reg. at 74438 (dissenting views of Members Miscimarra and Johnson). Equally relevant here is the following observation that Member Johnson and I expressed in our Election Rule dissenting views:

> The Final Rule's emphasis on speed stands in marked contrast to all of the other contexts in which Congress, courts, and Federal agencies have emphasized the need to guarantee more time, not less, when individuals are expected to exercise free choice about representation and other significant matters in a group setting. *A substantial universe of laws, regulations, and legal decisions specifically address the time needed for people to review and understand important issues before casting a vote or signing on the dotted line. All of these have one thing in common: They require more time, not less*. Against the backdrop of these examples, we have difficulty believing that Federal labor law works in reverse. The thrust of the Final Rule— unintended or not—is that employees make better choices when they vote first, and understand later. Congress and other state and Federal regulators have rejected such reasoning. Given that the Board's primary responsibility is to safeguard employee free choice, especially in elections, the Final Rule in this fundamental respect is deficient.

79 Fed. Reg. at 74436 (footnote omitted; emphasis added).

[14] Sec. 9(c)(1) (emphasis added).

[15] There is no question that the Hearing Officer and Regional Director ruled that the Employer could not litigate or introduce evidence regarding prejudice and the denial of due process caused by the Board's representation-election procedures. See hearing transcript, pp. 7, 13 ("The regional director has directed that there are no issues to be litigated in this proceeding. . . . I've been directed not to take evidence on the agency's R case rules."); Decision, p. 2 fn. 2 ("Based on the Employer's offer of proof regarding its objections to the Board's Final [Election] Rule . . . , I declined to permit litigation of this issue at the hearing because the Board and courts have already considered and rejected such arguments.").

[16] Hearing transcript, p. 8 (emphasis added).

Board and court cases that have denied challenges to "*the facial validity* of the [Election] Rule." See Decision, p. 2 fn. 2 (quoting *University of Southern California*, 365 NLRB No. 11, slip op. at 1 fn. 1 (emphasis added)). Therefore, I believe it is not correct that "the Board and courts have already considered and rejected" the same challenges raised by the Employer *in this case* based on the *application* of the Election Rule. Id. Rather, each of the cases relied upon in the Regional Director's Decision dealt only with challenges to the Election Rule's "facial validity." See *University of Southern California*, 365 NLRB No. 11, slip op. at 1 fn. 1 (rejecting the employer's "challenge to the facial validity of the [Election] Rule"); *Pulau Corp.*, 363 NLRB No. 8, slip op. at 1 fn. 1 (adopting the Regional Director's rationale that the Board had already considered and rejected "arguments concerning the facial validity of the . . . [election] rule"); *Associated Builders & Contractors of Texas v. NLRB*, 826 F.3d at 218, 220, 229 (rejecting "facial challenge" to the Election Rule and noting "the high burden faced by the [employer] entities in this facial challenge"); *Chamber of Commerce v. NLRB*, 118 F. Supp. 3d at 185-186 (rejecting U.S. Chamber's "facial challenge to the discretionary provisions of the Final Rule" and finding that any "as-applied challenge" was not ripe for adjudication "until the entire election process and subsequent Board review has come to its conclusion").

Indeed, although the Regional Director relies on *Pulau Corp.*, supra, the Board there ruled that the employer *waived* its objections to the election date because it "*did not present [the] facts, or its argument based on them . . . , to the Regional Director* prior to the election, *nor did it propose a later date for the election*." 363 NLRB No. 8, slip op. at 1 fn. 1. Contrary to *Pulau*, the Employer here *did* attempt to introduce evidence regarding relevant "facts," and "argument" based on them, "to the Regional Director prior to the election," and the Employer also proposed a "later date for the election." Id. Therefore, I believe it was clear error and an abuse of discretion for the Employer to be denied the opportunity to litigate these issues.

In conclusion, the Board and the courts have not addressed the claims raised by the Employer, which allege *actual* prejudice and the denial of due process *in this particular case*. By precluding the Employer from introducing any evidence regarding such prejudice or the denial of due process, these claims were effectively extinguished, and the absence of any record evidence deprives the Board and any reviewing court from even considering such claims. In short, putting aside whatever other harm the Employer might prove, the Employer has *already* been unfairly prejudiced and denied due process based on the refusal to permit litigation of these issues at the hearing. I believe the Employer has also been unfairly prejudiced by the erroneous conclusion that the Employer's arguments here have already been rejected, as a matter of law, in cases limited to challenges to the Election Rule's facial validity.

For the above reasons, I respectfully dissent from the majority's denial of the Employer's emergency request for review and the Employer's request to have the February 23, 2017 election date postponed to March 1, 2017.

Dated, Washington, D.C. February 23, 2017

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Philip A. Miscimarra, Acting Chairman

NATIONAL LABOR RELATIONS BOARD